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No. 188.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THE BETHLEHEM STEEL COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

Brief on behalf of the United States.

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THE BETHLEHEM STEEL COMPANY, Appellee.
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The Bethlehem Steel Company brought suit in the Court of Claims to recover the sum of $21,000 alleged to be due it from the United States upon a contract for the manufacture of 6 disappearing gun carriages for 12-inch breech-loading rifles, at $36,000 each. The gun carriages were to be constructed according to instructions, specifications, and drawings attached to and forming a part of the contract. By the terms of the contract the first carriage was to be completed and delivered within four months from the date of the contract, April 4, 1898, and the remaining five carriages within seven months from the date of the contract. The Government advertised for the construction of the carriages in question, notifying the bidders under the advertisement "that time will be considered very important." The

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Bethlehem Steel Company, in response to such advertisement, submitted bids or proposals in alternative form, as follows:

It is proposed to build 5 or more carriages at $31,000 each at a rate of delivery which would have required 12 or 13½ months for the completion and delivery of 5 or 6 carriages, respectively, or to build 5 or more carriages at $33,000 each at a rate of delivery which would have required 9 or 10 months for the completion and delivery of 5 or 6 carriages, respectively; or to build 5 or more carriages at $35,000 each at a rate of delivery which would have required 7 or 7⅔ months for the completion and delivery of 5 or 6 carriages, respectively; or to build 5 or more carriages at $36,000 each at a rate of delivery which would have required 6½ or 7 months for the completion and delivery of 5 or 6 carriages, respectively. The Government at that time being involved in international difficulties with Spain and in contemplation of war with that nation, accepted the last-named proposal, calling for the highest degree of celerity, and agreed to pay the highest named price. A contract was drawn accordingly, but in framing it a requirement as to the rate of delivery was incorporated therein which was greater than that submitted by the Bethlehem Steel Company. This requirement was subsequently modified so that the rate of delivery should be considered as the same as that proposed by the company.

In order that the Government should have the benefit of the entire proposition submitted by the Bethle-

hem Steel Company providing for a lower price for a slower rate of delivery, it was provided in the contract that if any carriage contracted for was not delivered by the party of the first part at the time specified in the contract, there should be deducted, in the discretion of the Chief of Ordnance, $35 per day from the contract price to be paid therefor, after allowing the company for delays properly chargeable to the Government. This $35 per day represents the value per day to the United States of these carriages, based upon the highest and lowest prices submitted by the Bethlehem Steel Company.

Referring to the contract price and rate of delivery and comparing them with the lowest price and corresponding slowest rate of delivery in the proposal of the company, it will be seen that there is a total difference in price of $30,000 and a corresponding difference in time of 855 days. These results are shown in the table following:

Carriage Nos.	Delivery under proposal No. 1.	Uniform rate of delivery which would have complied with the terms of the contract.	Difference in days between the deliveries at the two rates, respectively.
	Months.	*Months.*	
First	6	4	60
Second	7½	4⅔	93
Third	9	4⅔	126
Fourth	10½	5⅓	159
Fifth	12	5⅔	192
Sixth	13½	6	225
Total			855

The total number of days difference in delivery for all 6 carriages is 855, and the difference in price for all 6 carriages between that found in proposal No. 1 and that in the contract is $30,000.

The quotient obtained by dividing the $30,000 by 855 represents the value per day to the Bethlehem Steel Company on each of the several carriages, as based on this proposal. This amount is slightly in excess of $35.

This rate of deduction of $35 per day was calculated prior to the extension of the contract time from 6 to 7 months. The contract, therefore, while apparently providing for paying the company the highest price for the highest rate of delivery, nevertheless, by the incorporation of the deduction in price of $35 per day, really included the entire proposal of the company. In ascertaining this deduction and incorporating the same in the contract the Chief of Ordnance had in view the period of time covered by the entire proposal of the Bethlehem Steel Company, and the amount of deduction fixed upon was less than if any other two of the proposals of said company were considered.

The Bethlehem Steel Company proceeded with the construction of the carriages, but consumed about 14 months, instead of 7 months as agreed upon, and was paid by the Government on the basis of its proposal for such protracted period of delivery, together with liberal allowances made by the Government for delays for which the Chief of Ordnance found the contractor was not at fault. The contractor

demanded settlement upon a basis of a 7 months' period of construction, and that being refused brought this suit to recover the balance alleged to be due.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the appellant and in favor of the appellee upon the findings of fact.

BRIEF OF ARGUMENT.

The appellee entered into an agreement with the Government, by the terms of which it was to receive a stated sum for doing certain work within a stated time, and another and lesser sum if the completion of the work should be delayed. Having itself fixed what the difference in price should be, and having failed to complete the work contracted for within the prescribed time, which would entitle it to receive the highest price, it now seeks to recover the highest price and thereby escape the consequences of its own laches.

The contractor herein was expressly notified by the Government before it made its proposals, "that bids should be made for rapid delivery of a certain number of carriages or for less rapid delivery of the same," and, further, "that time will be considered very important."

It was in obedience to this suggestion that the contractor submitted proposals in alternative form. (Record, p. 8.)

The last proposal, or proposal No. 4, was accepted by the Government. It called for the most rapid delivery, for which the highest price was to be paid per carriage. The contract recognized the essential

features of the proposal, to the end that while the Government was willing to pay the sum of $36,000 per carriage, or the highest price, in the event the appellee should deliver the 6 carriages contracted for within the period of seven months, it also was embodied therein that if the appellee failed to make such deliveries within such time, due to its own fault, there should be a per diem deduction made from the contract price, so that the Government should not be obliged to pay, in any event, a larger sum for the carriages in question than that contained in appellee's proposals, which were based upon time alone.

In other words, the per diem deduction, which is improperly referred to in the contract as "penalty," but which is not in fact a penalty but a fixed rate of deduction for decreased speed in delivery, made by the appellee itself, and agreed to by the Government, was on the theory that the greater the speed in delivery the greater the price for the carriages should be and, conversely, the less the speed in delivery the less the price should be. This suggestion, emanating from the appellee and assented to by the Government, was embodied in the part of the contract which reads as follows:

> It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the time specified herein there will be deducted, in the discretion of the Chief of Ordnance, thirty-five dollars ($35.00) per day from the price to be paid therefor for each day of delay in the delivery of each carriage, respectively.

It is difficult to understand on what basis of law the United States should be compelled to pay the appellee the highest price bid, as per its proposals, for the most rapid rate of delivery, when, in truth, the deliveries made were practically in accordance with proposal No. 1, wherein the appellee would have received the minimum price for the slowest deliveries. *The appellee represented in its proposals that it was worth $5,000 more per carriage to deliver and complete the 6 carriages in question within 7 months than it was to complete and deliver the same carriages within 14 months. That being true, and that having been practically embodied in the contract, what legal or equitable right has the appellee to recover the sum prayed for?*

The appellee, in the proposals made in compliance with the advertisement and instructions to bidders, fixed and determined the amount of increased compensation which it was to receive in the event of the acceptance of the proposals made by it calling for increased speed or reduced compensation in the event of the acceptance by the Government of proposals made by it for reduced speed. This feature of the proposals having become a part of the contract as one of its express stipulations, it is too late to deny its justice or reasonableness, or to urge that it should not be exacted of the appellee for its default. The $35 per day per carriage for delay in delivery was made a part of the contract. If there is any doubt of this fact, it will be removed by referring to the correspondence between the claimant and the Chief of Ordnance, appearing on pages 10 and 11 of the transcript of rec-

ord. It will be found from this correspondence that the $35 per day was fixed and agreed upon between the parties before the signing of the contract and was one of the specific conditions of the contract.

If it is worth $5,000 less per carriage for the appellee to complete and deliver the carriages in 14 months than to do the same work and deliver the same carriages in 7 months, and the appellee so stated in its proposals and so obligated itself in the contract, from the provisions of which it now seeks to escape, the work in question having been done on the abovementioned basis and settlement having been made accordingly, why should the Government be asked or required to pay any more?

TIME WAS OF THE ESSENCE OF THE CONTRACT.

While this statement was not made in exact terms, nevertheless it is impossible to read the advertisements, the proposals, the correspondence, the stipulations of the contract relating to time, and the method adopted of arriving at the per diem deductions to be made without coming to the conclusion that it was one of the avowed objects of the contracting parties. It has been repeatedly held, in fact has become a legal maxim in cases of this character, as announced by Mr. Justice Story in the case of *Taylor* v. *Longworth* (14 Pet., 172–4), that:

> There is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties or it may arise by implication from the very nature of the property or the avowed objects of the seller or the pur-

> chaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking specific performance has been guilty of gross laches or has been unreasonably negligent in performing the contract on his part, or if there has in the intermediate period been a material change of circumstances affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.

This doctrine has been affirmed in a number of cases. (*Jones* v. *United States*, 96 U. S., 24.)

In *Secombe* v. *Steel* (20 How., 94–104), it is said:

> Time may be made of the essence of the contract by express stipulation or it may become essential from considerations arising from the nature of the property or the character of the interest bargained. And the principles of the courts of equity do not depend upon considerations collateral to the contract merely nor upon the conduct of the parties subsequently showing that time was not of the essence of the contract in the particular case, but it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. (*Brown* v. *Guaranty Trust Co.*, 128 U. S., 403–414.)

Here time was an all-important consideration—was so represented in the advertisements and the instructions to bidders, was so treated by the appellee in its proposals and in the contract itself.

THE PER DIEM DEDUCTIONS WERE NOT PENALTIES, THOUGH REFERRED TO AS SUCH IN THE CONTRACT.

Much stress was laid by opposing counsel, and obviously by the court below in its decision, upon the use of the word "penalty" in the contract itself, as though if that expression of evil omen should creep into a contract, whatever the terms of the contract or the manifest meaning of its provisions might be, the contractor might thereby escape the performance of his just obligations.

It is insisted, however, that neither the Government nor the court in its interpretation of the contract is to be concluded by the use of the technical term "penalty," for all text writers and all courts hold, as did the Court of Claims in the leading case of *Davis and Davidson* v. *United States* (17 C. Cls. R., p. 201), as stated in the syllabus, that—

> In determining whether the amount claimed in a contract shall be taken as penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent, which will be carried out so far only as it is right and reasonable.

And the court in that case, speaking through Mr. Chief Justice Nott, after using the above-quoted language, goes on to say:

> Where the contract has expressly designated the amount named as liquidated damages courts have held that it was penalty, and, con-

versely, where the contract has called it a penalty it has been held to be liquidated damages.

The above case has been cited with approval in the case of *Halladay et al.* v. *U. S.* (35 C. Cls. R., 453); also in the case of *Edgar Thompson Works* v. *U. S.* (34 C. Cls. R., 218).

As stated before, the cases are numerous where the courts have held the sum stipulated to be paid on breach of the agreement to be, from the nature of the case, a penalty, notwithstanding the strongest language showing the intention of the parties to be that it should be paid in full as liquidated damages.

Boys v. *Ancell*, 5 Bing., N. C., 391;
Davies v. *Penton*, 6 B. & C., 216;
Horner v. *Flintoff*, 9 M. & W., 678;
Reindel v. *Shell*, 4 C. B. N. S., 97.

On the other hand, cases are numerous in which the parties have used the term "penalty" which seems on its face to import a forfeiture rather than a valuation of damage, yet the courts have held that the stipulated sum was, from the very nature of the case, to be considered as liquidated damages and recoverable in full.

Sainter v. *Ferguson*, 7 C. B., 716.
Leighton v. *Wales*, 3 M. & W., 545.
Sparrow v. *Paris*, 7 H. & N., 594.

"The use of the term penalty or liquidated damages is not conclusive on the one hand, and provision for liquidated damages may appear from the contract to be a provision for a penalty, and will accordingly be so treated."

"On the other hand, a contract for a 'penalty' may appear from the context to be a contract for 'liquidated damages,' and may be so treated."

Page on Contracts, 1905, section 1172.
Robinson v. *Aid Society*, 68 N. J. L., 723.
Illinois Central Ry. v. *Cabinet Co.*, 104 Tenn., 568.
Clark v. *Barnard*, 108 U. S., 436.
Jacqua v. *Heddington*, 114 Ind., 309.

"If the damages accruing from the breach of contract are of an uncertain nature, and the parties have chosen to assess them beforehand by agreement among themselves, and the amount agreed upon is no more than may be a reasonable measure of damages, it is not a penalty, although it is denominated penal sum." (Addison on Contracts, 10th ed., 1903, p. 264.)

In determining whether the sum named is a penalty or liquidated damages, the courts will not be guided by the name given to it by the parties. In other words, if it is liquidated damages they will enforce it, though it was erroneously termed penalty. (*Ward* v. *Building Co.*, 125 N. Y., 230; *Bagley* v. *Peddie*, 16 N. Y., 469.)

How the Court of Claims arrived at its conclusion of law in this case in view of its decision in the case of the *Phœnix Iron Company* v. *United States* (39 C. Cls. R., 526) and the decisions therein cited is not apparent. The decision of the court below in the case cited and the reasoning of the court on which it is based are clearly in harmony with the contention of the Government herein.

In the case cited, as in the case at bar, time was an essential feature of the contract. There, as here, the contract provided that a per diem deduction should be made for each day of delay in the completion of the contract due to the fault of the contractor. In that case the deduction was referred to as "liquidated damages," while in this case it is misnamed "penalities," but in other respects the cases were identical. There the court in its decision adopted the view of the Government, here the view of the claimant. Perhaps no better synopsis of the leading authorities on this question can be found than that presented by Judge Weldon. In delivering the opinion of the Court of Claims he said:

> While courts are disposed to construe contracts of the kind in controversy as open to the question of real or actual damages, they do not hesitate to enforce the agreement when from the terms of the contract and the subject-matter of the litigation it is shown that the parties have agreed to the amount as a settlement of the real or actual damages.
>
> If the intention, however, is clear to liquidate damages and the amount is either not greatly above or below the sum which would otherwise be recoverable, or, if above, were fixed specifically to cover contemplated consequential losses not provable under legal rules, and is not an unreasonable provision therefor, the sum fixed may be sustained as liquidated damages. (Sutherland on Damages, vol. 1, p. 504.)
>
> Many cases, some of which will be hereafter

noted, have been decided in this court involving the question as to whether the stipulation of the parties on the subject of damages was to be treated as a mere penalty or liquidated damages, precluding an inquiry into the question as to how much the party had suffered by the delinquency or default of the other party. One of the last and leading cases on the subject of the stipulation of parties of the sum to be paid for nonperformance of a covenant is the case of the *Sun Printing and Publishing Association* v. *Moore*. (183 U. S., 643.) As stated in the syllabus, it is said:

The naming of a stipulated sum to be paid for the nonperformance of a covenant is conclusive upon the parties in the absence of fraud or mutual mistake.

Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from a breach of the agreement.

The law does not limit an owner of property from affixing his own estimate of its value upon a sale thereof.

It is true that in the above case it was not a question of penalty or liquidated damages, but the transaction is akin to a stipulation as to the damages in case of the nonperformance of an agreement within a specified time.

Where the parties have agreed upon an amount of damages by way of adjustment and have so expressed it, the amount fixed will be treated as damages and not as penalty. (*Gammon* v. *Howe*, 14 Me., 250.)

In the case of *Dakin* v. *Williams* (17 Wend., 447), Chief Justice Nelson said:

"From a critical examination of all these cases, and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used it must be carried into effect. A court of law possesses no dispensing powers; it can not inquire whether the parties have acted wisely or harshly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to the parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement."

In the case of *Hall* v. *Crowley* (87 Mass., 314) the court in substance said:

"The sum named is for doing one certain and specific job of work within a prescribed time, and not for the omission to comply with diverse and separate stipulations; that the loss or injury which would accrue to the owner for the noncompletion of the house according to the terms of the contract would be difficult to estimate and prove. All these circumstances indicate the intent of the parties to insert a fixed measure of damages and not penalty."

Where the intent of the parties is clear, the

use of the word "forfeit" in the clause providing for damages is not regarded as of much weight.

In the case of *Worruff* v. *McClanahan* (5 Storbh. (5 Carr), 115) it was held that forfeiture took the form of liquidated or stated damages where it was provided that the builder should forfeit $100 per month from a certain time until the actual completion of the house. The court said: "While we fear the plaintiff has made an agreement which will work harshly upon him, it is his contract."

In a case where the party in consideration with another conveyed to him 14 city lots for a consideration of $21,000, covenanted that he would by a certain day erect two brick houses, or in default thereof pay to the grantor on demand the sum of $4,000, the court held that the sum was liquidated damages. (*Pearson* v. *Williams*, 24 Wend. (N. Y.), 244; 26 Wend. (N. Y.), 630.)

In the case of *Halliday et al.* v. *United States* (33 C. Cls. R., 468) it was held that after the extension of time for the completion of the contract the parties stipulated that in case of a failure to complete within the extended time the sum of $50 per day should be paid for such failure, that the sum assumed the form of liquidated damages equivalent to "the measure of injury or compensation" as used in the case of *Van Buren* v. *Diggs*. (11 How., 361.)

The attention of the court * * * is called to the case of *Davis* v. *United States* (17 C. Cls. R., 201), in which it is held, in sub-

stance, that the court is influenced largely by the reasonableness of the transaction in the determination of the question as to whether the stipulated sum is to be construed as penalty or liquidated damages.

In the case of *Edgar Thompson Works* v. *The United States* (34 C. Cls R., 205) it is said:

"Each case must be governed by its peculiar facts, and no general rule can be prescribed in doubtful cases to determine the question as to whether the provision is to be regarded as a penalty or to be enforced as a compensation for the injury. The contract of the parties will be enforced as to liquidated damages if conscionable, but in doubtful cases will be construed as a penalty, and thereby enforce against the delinquent party a responsibility only to the extent of allowing the injured party a just compensation for the injury sustained."

In the same opinion the court says:

The subject-matter of the contract belongs to the class which is not easily susceptible of proof of actual damages, and therefore it was most expedient, from the peculiar character of the agreement, that the parties should fix the amount of damages.

Is not such comment equally applicable to this case, where the actual damages are unquestionably impossible of ascertainment? According to the contention of the appellee, the clause in the contract providing for a per diem deduction in case of its failure to deliver the carriages within the contract period is

meaningless, although it was carefully calculated, considered, and presented in the alternative proposals submitted in response to the advertisements of the United States, and the amount of said deductions for delay attributable to the fault of the appellee was fixed by the appellee itself and subsequently embodied in the contract.

Such contention is not in harmony with sound legal principles or good common sense, which is the fountain head of both law and equity.

The case of *Van Buren* v. *Diggs* (11 How., 461–467) differs materially from the case at bar in that whereas in the case cited an arbitrary amount was declared to be forfeited by Diggs to Van Buren in case of the builder's failure to build the house contracted for by a specified time, in this case the damages agreed upon for the nondelivery of the carriages, due to the fault of the appellee, were carefully calculated, measured, and determined upon by the appellee, were incorporated in its proposals, and formed the basis for the stipulation in the contract relating to damages in the case of the appellee's default. In the Van Buren and Diggs case (*supra*) a case of this character was expressly excepted, for the court therein says (p. 477):

> Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice.

In the case at bar, the appellee having fixed the price at which it was worth to build the carriages within time limits, and this having been accepted by

the Government as a basis of damage in case of the appellee's failure to build the carriages according to said time schedule, brings this case within the exception above noted, and hence the case cited supports the contention of the appellant rather than that of the appellee.

As was said by Mr. Justice Wright in *Clement* v. *Cash* (25 N. Y., 253), a case cited with approval by this court in the case of the *Sun Printing and Publishing Association* v. *Moore* (183 U. S., 642):

> A court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such case there would be room for construction, but certainly none where the meaning of the parties was evident and unmistakable.

And the court, after exhaustively reviewing the authorities, including its former decisions and the decisions of other courts with respect to the doctrine of penalties and liquidated damages, goes on to say:

> From a critical examination of all these cases and others that might be referred to, it will be found that the business of the court, in con-

strueing this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used it must be carried into effect. A court of law possesses no dispensing powers; it can not inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement.

Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance a measure of compensation, however extravagant it may be, for a violation of their covenant (they surely may after it has accrued) without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and, regarding the intent of the parties, it is not to be doubted but that the sum of $3,000 was fixed upon by them "mutually and expressly," as they say, "as the measure of damages for the violation of the covenant, or any of its terms or conditions." If it be said that the measure is

> a hard one, it may be replied that the defendant should not have stipulated for it, or, having been thus indiscreet, they should have sought the only exemption which was still within their power, namely, the faithful fulfillment of their agreement.

Applying the reasoning of the court to the case at bar, why should this court be asked to make a better contract for the parties herein than they have made for themselves? Surely both of these parties were "competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case," and, therefore, "the court is bound to enforce the agreement."

In fact, applying the language quoted from the learned authority to the case at bar, and it applies as if it were uttered in this case and for this case, the conclusion of the court in both cases should be the same, to the effect that "if it be said that the measure is a hard one, it may be replied that the defendants should not have stipulated for it, or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

ACTUAL DAMAGES IMPOSSIBLE OF ASCERTAINMENT.

It would be difficult to imagine a case wherein the actual damages, although clearly existing, would be more thoroughly beyond the pale of ascertainment by positive proofs. Here is a machine which is

intended for use in connection with war operations, the value of its use in case of war or the value of its possession in time of peace would be entirely an unknown quantity, and hence the damages sustained by reason of the nondelivery of the same when contracted for would be entirely an unknown quantity. It has become almost axiomatic, however, that "the best insurance policy for peace is adequate preparedness for war," and although it is shown that the war between the United States and Spain ceased prior to the contract time for delivery of the carriages in question, and had ceased for a very long period prior to the actual delivery of said carriages, nevertheless it can not be said that the conclusion of actual hostilities entirely deprived the United States of the necessity of strengthening its coast defenses by the installation of the carriages in question.

Who can measure the actual damages in case of the nondelivery of such a piece of mechanism, however costly it may be or however important its use, either in war or in peace? This utter impossibility suggests the necessity for a clause in the contract providing for liquidated or compensatory damages, which, notwithstanding the unfortunate phrasing of the War Department with respect thereto, was clearly intended to be such, and as such has been shown to be reasonable and conscionable. In determining the necessity for such a provision in the contract in question the court must consider the existing conditions at the time the contract was made.

LIQUIDATED DAMAGES DEFINED AND DISTINGUISHED FROM PENALTY.

The law in the case may be summed up as follows:

Where the contract calls for a per diem deduction as the measure of injury, in the event of the occurrence of a specified contingency, and the sum agreed upon does not appear unreasonable upon the face of the contract, and the actual damages are impossible of ascertainment, and no fraud or duress has been practiced to induce either party to enter into the contract, and the sources of information are open alike to both parties, the court should hold that the sum stipulated is the agreed measure of damages.

Examined with care, it will be found that the contract in suit clearly provides for damages of the above description: First, the contract provides for a per diem deduction as the measure of injury, the same being $35 per day to be deducted from the contract price in case of default due to claimant company; second, the deduction is to be made only in the event of the happening of a specified contingency, viz, the failure of the claimant company to complete and deliver the gun carriages within the contract time; third, the sum agreed upon is not unreasonable (it is evaluated by the claimant company itself in its proposals); fourth, the actual damages sustained are impossible of ascertainment; fifth, neither fraud nor duress was practiced to induce the claimant company to enter into the contract; sixth, the claimant company and the defendant had equal sources of and

opportunities for information relative to the matters covered by the contract.

The United States is entitled to the decreased cost of manufacture due to the benefit that the contractor received by taking longer time to perform the work contracted for.

This is shown to be the amount for which the claimant sues. The comment of the Court of Claims in rendering its decision herein, in which it speaks of a total deduction of 35.48 per cent on the cost of each gun carriage, providing the delay should amount to one year, is entirely impertinent to the issues involved, for the deliveries were wholly within the period covered by the various propositions of the claimant company.

IN THE GOVERNMENT'S VIEW OF THE CASE, THE QUESTION PRESENTED IS ONE OF CONTRACT PRICE ALONE.

The Court of Claims erred in declaring that the per diem deductions were "penalties" imposed upon the appellee. The question presented was not and is not one of "penalty," but of contract price, pure and simple. That price was determinable according to time of delivery. That the war which was impending when the contract was let was concluded before the contract time for delivery of the carriages had expired is of no importance. It was the hazard of war and the interests of the case that impelled the Government to call for bids on a basis of celerity, and it was upon that basis that the proposals of the appellee and other bidders were made, and it was

also upon that basis that the contract was drawn and executed. Whether or not the urgent need for said carriages passed away with the conclusion of hostilities is of no importance, nor will it tend to excuse the appellee from the consequences of its own laches nor will it fix a higher price to be paid by the Government upon the work in question.

Obviously, the Government, under the contract and the circumstances, was entitled to the lowest and not the highest price, for the appellee had clearly forfeited all right to demand or receive the maximum price. The Government is entitled to the same protection against fraud and imposition as a private citizen. In this view the position of the appellee is utterly untenable and indefensible. The appellee asks to be paid for diligence which it has not shown, thereby escaping the consequences of its own stipulations, agreements, and acts by raising the specious cry of "penalty."

This court should set the seal of its disapproval upon such a palpable attempt to evade contract obligations.

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